Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-431

WILLIAM VAN LEWIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William Van Lewis, by and through his attorneys Ralph H. Richardson and S. Allen Early, Jr., petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming his Conviction on one count of possession of heroin with intent to distribute, (21 USC 841 (a) (1)). The indictment is printed as Appendix "A", *infra*.

OPINIONS BELOW

The District Judge filed an unreported Order denying Appellant's first Pre-Trial Motion to Suppress. That Order is printed as Appendix "B", *infra*. A second and expanded Pre-Trial Motion to suppress was denied in

a published opinion, *United States* v. *Van Lewis, et al.*, 409 F. U.S. Supp. 535 (E.D. Mich. 1976). The Opinion of the Court of Appeals is not yet reported. It is printed as Appendix "C", *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 6, 1977 (Appendix C). A timely Petition for Rehearing was denied on August 5, 1977, by an order which is printed as Appendix "D", *infra*. On August 31, 1977,this Court granted an Order extending time to file this Petition (Appendix E, *infra*). Jurisdiction is conferred upon this Court by 28 USC 1254.

QUESTIONS PRESENTED

I.

Is the "layers of information" theory sufficient probable cause to arrest the Defendant where the sum total of the layers equals to a compilation of identification data unsupported by either reliable informant hearsay or any corroborative observations by the arresting officer giving probable cause to believe Appellant was committing or had committed a crime at the time of his arrest?

II

Even assuming the existence of probable cause to arrest Appellant, was a search warrant required before federal agents could open luggage which the agent had seized from the Appellant at the time of his arrest?

STATEMENT OF THE CASE

On July 9, 1975, Appellant was arrested, and his baggage, which had been locked, was searched without a warrant at the Detroit Metropolitan Airport by agents of the Drug Enforcement Administration. A quantity of heroin was recovered by virtue of the search. Appellant was arraigned on a complaint the next day, indicted on one count on July 22, 1975 (Appendix A) and duly arraigned on same thereafter.

On December 1, 1975, Appellant filed his first Motion to Suppress the Evidence seized in the course of the search, and his Motion was denied (See Order, App. B). Appellant proceeded to trial on December 22, 1975, and a mistrial was declared when the jury could not agree.

Appellant filed a subsequent, expanded Motion to Suppress on January 13, 1976, and same was again denied by the trial court. Appellant *United States* v *Van Lewis*, et al., 409 F. Supp. 535 (E.D. Mich 1976), then proceeded to trial again on March 16, 1976 and was found guilty as charged by the jury. Appellant was sentenced on May 4, 1976, and is not on bond pending appeal.

The facts of the case were developed in pre-trial evidentiary hearings on Motions to Suppress Evidence and at trial. On the morning of July 8, 1975, Mrs. Susan LeBlanc, a ticket agent for American Airlanes at the Detroit Metropolitan Airport, informed DEA Agent Paul Markonni that a person named "J. Hall" had just purchased a first class ticket on a flight to Los Angeles, California, with currency in twenty dollar bills. Mrs. LeBlanc gave Agent Markonni a description of "J. Hall" and said that "J. Hall" had initially requested a one way ticket to Los Angeles but then stated that he wanted a round trip ticket because if everything went all right he would be coming back later that evening. Mrs. LeBlanc added that "J. Hall" had checked a small suitcase that appeared to be empty except for one small item which slid around inside the suitcase.

In Mrs. LeBlanc's opinion "J. Hall" fit a " drug courier profile" that DEA agents have used at the Detroit Metropolitan Airport to indicate persons likely to be carrying drugs. The characteristics listed on the profile include: (1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases; (4) nervousness; and (5) use of an alias.

Agent Markonni sought to check the reservation made by "J. Hall." Markonni found that it had been made earlier that week by telephone and that a telephone number had been provided as a contact. Markonni checked the telephone number and found it to be listed to William Van Lewis (the appellant), 7248 Rutland, Apt. 305, Detroit. The agent went to the apartment and identified himself to the apartment manager, who spontaneously stated that the Detroit Police Department had that apartment under surveillance for alleged narcotics traffic. The description of William Van Lewis given by the apartment manager matched that of "J. Hall" given by Mrs. LeBlanc, the American Airlines ticket agent. The apartment manager also informed Markonni that he believed that Appellant lived somewhere other than in the apartment, and he provided Markonni with a description of Appellant's car and license plate number.

Agent Markonni determined that the license plate number was registered to Appellant at 18463 Edinborough, Detroit. A name check was then made with the Detroit Police Department, which informed Markonni that a person similarly identified had been arrested in February, 1973, for possession of heroin, and that this person had previously been convicted for attempted

unlawful use of an automobile and for uttering and publishing. The description of Appellant in Detroit police files matched that of "J. Hall."

Markonni left word with American Airlines to alert him when "Hall" was scheduled to return. At 4:00 a.m., July 9, 1975, Markonni was informed by an American Airlines employee that "Hall" was returning on a flight from Los Angeles early that morning.

Agent Markonni and DEA Agent Thomas Dykstra went to the airport. There they saw Appellant deplane and go to the baggage claim area. Appellant was wearing the same blue denim leisure suit that he had been described as wearing to California the day before. Because all the passengers but Appellant received their luggage, Appellant had to go to the American Airlines baggage office to claim his suitcase. While he waited for his suitcase, Agent Markonni and Agent Dykstra kept watching Appellant, and, according to the agents, he appeared nervous.

As soon as Appellant received his suitcase and began to leave the airport terminal, the two DEA agents approached Appellant, informed him that they believed he was in possession of narcotics, and requested him to accompany them to a small office in the airport terminal. In the office, Appellant identified himself as William Van Lewis. Appellant was given *Miranda* warnings. When asked if his suitcase was locked, Appellant, without verbal response, either set the combination of the suitcase so that it could be opened or simply handed the already unlocked suitcase to Agent Markonni who opened it. Only a shaving kit and one piece of clothing were found inside the suitcase. The DEA agents opened the shaving kit and found heroin.

REASONS FOR GRANTING THE WRIT

I.

THE "LAYERS OF INFORMATION" THEORY WAS AN INSUFFICIENT BASIS FOR PROBABLE CAUSE TO ARREST OR SEARCH APPELLANT'S LUGGAGE WHERE THE ONLY INFORMATION ACQUIRED BY THE ARRESTING AGENT, OUTSIDE OF THE "COURIER PROFILE," SERVED ONLY AS A COMPILATION OF IDENTIFYING DATA, RATHER THAN RELIABLE INFORMATION OR OBSERVATIONS OF APPELLANT BY THE AGENT WHICH SUPPORTED PROBABLE CAUSE TO BELIEVE APPELLANT HAD COMMITTED A CRIME OR WAS COMMITTING A CRIME AT THE TIME OF HIS ARREST.

The "layers of information" theory of the Sixth Circuit Court of Appeals was mistakenly advanced as probable cause to arrest Appellant in a situation where the total of the layers was simply a well researched effort by the DEA agent to identify an airlines passenger who had apparently bought his ticket in a name other than his own.

At the very worst, the agent's investigation developed hearsay from an untested informant that another law enforcement agency was surveilling an apartment used by Appellant. A name check of police records indicated a drug related arrest two and a half years previously. There was no conviction.

Once satisifed that he had ascertained the true identity of the suspect and that this identity indicated a name different than that used by the suspected passenger, the DEA agent, had with some certainty confirmed the fifth element of the "drug courier profile" (see Statement of Case, p. 3).

Beyond the identification information, the agent was content to await the return of the suspect to the City of Detroit without any information at all concerning the activity of the suspect from which a reasonable man could infer that the suspect had committed a crime or was committing a crime at the time of his arrest.

The Court of Appeals correctly concedes in its opinion that the "drug courier profile" is insufficient to establish probable cause. See also *United States* v *Rothman* (use of alias), 492 F. 2d 1260 (CA 9, 1973); *United States* v *Ruiz - Estrella*, 481 F 2d 723 (CA 2, 1973); *United States* v *Muelener* 351 F. Supp. 1284 (CD Calif. 1972) *United States* v *Allen*, 349 F. Supp 750 (ND Calif. 1972).

Case law has made it very clear that a mere prior arrest, not made by the current arresting officer, without a resulting conviction is irrelevant to probable cause, (*Spinelli* v *United States*, 394 US 410 (1969). Logically, this is quite reasonable.

Moreover, the "layers of information" theory which is a perversion of the "totality of the circumstances" test for probable cause (translated, means "great suspicion") is not what Rule 5(c) calls for. This "test" of great suspicion was specifically rejected in (*Spinelli* v *United States*, 394 US 410, 433 (1969). The facts shown must meet the standard that Congress and the Supreme Court have laid down. Whether there are 5 or 50 suspicious circumstances,

somewhere along the line, a detached party should be able to say that he could directly infer that at the point of arrest, Appellant was probably carrying narcotics without having to resort to equivocal profiles or the piling of a five-layer inference. The courts have steadfastly refused to succumb and have demanded that the arrest be constitutionally acceptable. (*Sibron* v *New York*, 392 US 40 (1968).

II.

IF PROBABLE CAUSE EXISTED TO ARREST APPELLANT, A SEARCH OF HIS LUGGAGE WAS IMPERMISSIBLE WITHOUT A SEARCH WARRANT.

Petitioner submits that the Supreme Court in *United States* v *Chadwick*, No. 75-1721, holds that the issue, under the circumstances of this case, does not turn on whether probable cause existed for the arrest of one whose baggage has been searched without a warrant. Rather, the issue is whether conditions which obviate the requirement of a search warrant existed, even if the arrest was valid.

> *Chadwick* questions the Government contention that "In all other situations (other than homes, offices and private communications) . . . less significant privacy values are at stake, and the reasonableness of a government intrusion should depend solely on whether there is probable cause to believe evidence of criminal conduct is present. Where personal effects are lawfully seized outside the home on probable cause, the Government would thus regard searches without a warrant as not 'unreasonable'."

The *Chadwick* Court quickly answers in the negative, and explains the reasonable and the unreasonable:

> "The potential dangers lurking in all custodial arrests makes warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved (*United States* v *Robinson*, 404 U.S. 218 (1975); *Terry* v *Ohio*, 592 U.S. 1 (1968).
>
> However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest *either* if the "search is remote in time or place from the arrest," *Preston* v. *United States*, 376 U.S. at 367 *or no* (italics our own) exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.
>
> "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest *or* (Italics our own) as justified by any other exigency. Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In

our view, when no exigency is shown to support the need for an immediate search, *the Warrant Clause places the line at the point where the property to be searched comes under the exlusive dominion of police authority*. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded. Accordingly, the judgment is affirmed," (*United States* v *Chadwick*, 21 Crim Law 3173).

No exigency was created by the surrounding circumstances in the present *Van Lewis* case. The Federal Agents were in exclusive control of the Appellant's luggage and he was himself under arrest and confined to the baggage area office room by the agents. There was no suggestion that the contents of the luggage would present any danger to its custodians.

RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted,

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Detroit, Michigan
August 18, 1977

APPENDIX "A"
INDICTMENT

(In the United States District Court
For the Eastern District of Michigan
Southern Division)

United States of America, Plaintiff v. William Van Lewis, Defendant. Criminal No. 5-81186

THE GRAND JURY CHARGES:

That on or about July 9, 1975, in the Eastern District of Michigan, Southern Division, William Van Lewis, Defendant herein, *did knowingly and unlawfully posses with intent to distribute* approximately 123.52 grams of heroin, a Schedule I Narcotic Drug Controlled Substance; in violation of Section 841(a) (1), Title 21, United States Code.

THIS IS A TRUE BILL
Foreman

Ralph B. Guy Jr.
United States Attorney

John L. Christensen
Assistant U.S. Attorney

Dated: July 22, 1975

APPENDIX "B"
ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

United States of America, Plaintiff v. William Van Lewis, Defendant. Criminal No. 5-81186

On December 1, 1975, the defendant filed a Motion to Suppress Evidence and a request for a hearing. The Court thereupon reviewed the defendant's Brief in Support and the Government's response thereto. On December 17, 1975, a hearing was held; in attendance were Elliott Hall, counsel for the defendant, and Richard F. Yanko, Assistant United States Attorney. A determination was made by the Court that Special Agent Paul Markonni had probable cause to arrest the defendant, William Van Lewis, and that the search incident to the arrest on July 9, 1975 was lawful. The Court's reasons for its findings were stated on the record, in open Court, before the parties in attendance.

Now, therefore, it is hereby ordered that the defendant's Motion to Suppress be, and it hereby is, denied.

/s/ Honorable Charles W. Joiner
United States District Judge

Dated: Dec. 18, 1975

APPENDIX "C"
OPINION

(United States Court of Appeals for the Sixth Circuit)
No. 76-2125

United States of America, Plaintiff-Appellee v. William Van Lewis, Defendant-Appellant.

Decided and Filed June 6,1977.

Before Weick, Peck and Engel, Circuit Judges.

Peck Circuit Judge. Defendant-appellant William Van Lewis was found guilty by a jury of having knowingly and unlawfully possessed the Schedule I controlled substance heroin in violation of 21 U.S.C. § 841(a) (1).[1] Appellant was sentenced to serve a term of 18 months in prison. Appellant now appeals his conviction on the ground that the district court erred when it denied his pretrial motions to suppress the evidence of heroin seized by agents of the Drug Enforcement Administration (DEA) in the course of a search at the Detroit Metropolitan

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[1] 21 U.S.C. § 841 (a) (1):
(a) Except as authorized by this subchapter for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Airport and then admitted the heroin into evidence at trial.[2] We affirm the appellant's conviction.

The facts of the case were developed in pretrial evidentiary hearings on motions to suppress evidence and at trial. On the morning of July 8, 1975, Mrs. Susan LeBlanc, a ticket agent for American Airlines at the Detroit Metropolitan Airport, informed DEA Special Agent Paul Markonni that a suspicious person by the name of "J. Hall" had just purchased a first class ticket on a flight to Los Angeles, California, with currency of small denominations. Mrs. LeBlanc gave Agent Markonni a description of "J. Hall" and said that "J. Hall" had initially requested a one way ticket to Los Angeles but then stated that he wanted a round trip ticket because if everything went all right he would be coming back later that evening. Mrs. LeBlanc added that "J. Hall" had checked a small suitcase that appeared to be empty except for one small item which slid around inside the suitcase.

[2] On December 1, 1975, appellant filed his first motion to suppress evidence, but his motion was denied on December 18, 1975. Appellant proceeded to trial on December 22, 1975. A mistrial was declared when the jury could not agree. On January 13, 1976, appellant filed another expanded motion to suppress evidence. After an evidentiary hearing that consolidated three cases, *United States* v. *Van Lewis*, Criminal Action No. 5-8118, *United States* v. *Hughes*, Criminal Action No. 5-8172, and *United States* v. *McCaleb, White and Page*, Criminal Action No. 5-8185, appellant's motion was again denied in a published opinion. *United States* v. *Van Lewis, et al.*, 409 F.Supp. 535 (E.D. Mich. 1976). Appellant proceeded to trial again on March 16, 1976, and was found guilty as charged by the jury.

"J. Hall" appeared suspicious to Mrs. LeBlanc because he fit a "drug courier profile" that DEA agents have used at the Detroit Metropolitan Airport to indicate persons likely to be carrying drugs. The characteristics listed on the profile include: (1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases; (4) nervousness; and (5) use of an alias. *See United States* v *McCaleb, Page* – F.2d —, Nos. 76-2060-61 (6th Cir. slip op. filed April 11, 1977).

Agent Markonni sought to check the reservation made by "J. Hall." Markonni found that it had been made earlier that week by telephone and that a telephone number had been provided as a contact. Markonni checked the telephone number and found it to be listed to William Van Lewis (the appellant), 7248 Rutland, Apt. 305, Detroit. The agent went to the apartment and identified himself to the apartment manager, who spontaneously suggested that the agent must be there to inquire about William Van Lewis in Apt. 305. Markonni asked why he thought so, and the manager said that the Detroit Police Department had the apartment under surveillance for alleged narcotics traffic. The description of William Van Lewis given by the apartment manager matched that of "J. Hall" given by Mrs. LeBlanc, the

American Airlines ticket agent. The apartment manager also informed Markonni that he believed that appellant lived somewhere other than in the apartment, and he provided Markonni with a description of appellant's car and the license plate number.

Agent Markonni discovered that the license plate number was registered to appellant at 18463 Edinborough, Detroit. A check was then made with the Detroit Police Department, which informed Markonni that appellant had been arrested in February, 1973, for possession of heroin, and that he had previously been convicted for attempted unlawful use of an automobile and for uttering and publishing. The description of appellant in Detroit police files matched that of "J. Hall."

Markonni left word with American Airlines to alert him when "Hall" was scheduled to return. At 4:00 a.m., on July 9, 1975, Markonni was informed by an American Airlines employee that "Hall" was returning on a flight from Los Angeles early that morning.

Agent Markonni and DEA Special Agent Thomas Dykstra went to the airport. There they saw appellant deplane and go to the baggage claim area. Appellant was wearing the same blue denim leisure suit that he had worn to California the day before. Because all the passengers but appellant received their luggage, appellant had to go to the American Airlines baggage office to claim his suitcase. While he waited for his

suitcase, Agent Markonni and Agent Dykstra kept watching appellant, and according to the agents, he appeared nervous.

As soon as appellant received his suitcase and began to leave the airport terminal, the two DEA agents, believing that they had probable cause to arrest, approached appellant, informed him that they believed he was in possession of narcotics, and requested him to accompany them to a samll office in the airport terminal. In the office, appellant identified himself as William Van Lewis. Appellant was given *Miranda* warnings. When asked if his suitcase was locked appellant, without verbal response, either set the combination of the suitcase so that it could be opened or simply handed the already unlocked suitcase to Agent Markonni. The suitcase was then opened by Agent Markonni. Only a shaving kit and one piece of clothing were found inside the suitcase. The DEA agents opened the shaving kit and found the heroin.

The district court agreed with the United States that there was probable cause to arrest appellant when he claimed his baggage at the airport and that the search of appellant's suitcase was valid as a search incident to an arrest.[3] The district court considered the DEA use of the

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[3] The district court also held that appellant had consented to the search under *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). *United States* v *Van Lewis, et al., supra*. We do not reach that issue because of our disposition of the case on the issue of a lawful warrantless search incident to a valid arrest.

"drug courier profile" and determined that the fact that a person possessed characteristics fitting the profile did not, without more indicia of criminal activity, provide DEA agents with probable cause to arrest. Nevertheless, the district court held that in appellant's case, the combination of the fact that appellant fit the DEA "drug courier profile" with additional information indicating that appellant was involved in narcotics traffic supplied the probable cause necessary to arrest legally the appellant.

On appeal, appellant contends that there was not probable cause to arrest him and that the evidence of heroin should therefore have been suppressed. Appellant especially attacks the use by the district court of the "drug courier profile" as an improper element to be considered in a determination of probable cause. The issue is thus whether there was probable cause to arrest appellant at the time he was escorted to the airport office, which would have made a warrantless search incident to a valid arrest permissible. *United States* v *Robinson*, 414 U.S. 218 (1973); *Ker* v *California*, 374 U.S. 23 (1962); *United States* v *Rabinowitz*, 339 U.S. 56 (1950); *Manning* v *Jarnigan*, 501 F.2d 408 (6th Cir. 1974).

The Supreme Court in *Beck* v *Ohio*, 379 U.S. 89 (1964) stated that the constitutionality of an arrest "depends

upon whether, at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." 379 U.S. at 91. The determination as to whether there was probable cause to arrest is "an act of judgment formed in light of the particular situation and with account of all the circumstances." *Brinegar* v *United States*, 338 U.S. 160, 176 (1949). That judgment is guided by "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v *United States, supra*, 338 U.S. at 175. The rule of probable cause thus rests upon a common sense approach that accomodates the need for effective law enforcement and the need to insulate law-abiding citizens from official capriciousness. *Beck* v *Ohio, supra*, 379 U.S. at 91; *Brinegar* v *United States, supra*, 338 U.S. at 176. *See United States* v *Hunter and Allen*, — F.2d —, No. 76-1631 (6th Cir. slip op. filed March 4, 1977); *United States* v *Prince*, 548 F.2d 164 (1977); *United States* v *Upthegrove, et al.*, 504 F.2d 682 (6th Cir. 1974).

In appellant's case, the fact that appellant fit the "drug courier profile" is not a relevant factor in determining

whether there was probable cause to arrest. In *United States* v *McCaleb, Page, supra*, — F.2d at —, slip op. at 4, we stated that we agreed with the district court judge that the "drug courier profile," by itself, could not provide the probable cause necessary to justify legally the arrest of an individual. We also stated that in the context of *McCaleb*, the "drug courier profile" could not even provide the founded suspicion to justify an investigative stop under *Terry* v *Ohio*, 392 U.S. 1 (1968). Even assuming that an adequate profile could be drawn, under the rule laid down by the district court, in making his probable cause determination, the officer would still be faced with the extremely difficult problem of determining whether a person fit the profile and even more formidable responsibility of deciding whether there was sufficient additional information.

Such a probable cause inquiry would be inappropriate for two reasons. First, the profile is too amorphous to be integrated into a legal standard. When appellant was arrested, "this profile was not written down, nor was it made clear to agents exactly how many or what combination of the characteristics needed to be present in order to justify an investigative stop or an arrest." *United States* v *McCaleb, Page, supra*, — F.2d at —, slip op. at 3. Second, using the profile to determine

probable cause would engage this Court in an improper analysis. The proper analytical approach, adopted in *United States* v *Barnett*, 407 F.2d 1114, 1118 (6th Cir. 1969), and reaffirmed in *United States* v *Prince, supra*, 548 F.2d at 166, was set down by then Circuit Judge Burger in *Smith* v *United States*, 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

> "[P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated' total."

If the "drug courier profile" were a major factor in resolving an issue of probable cause, we would be weighing individual layers of information, instead of evaluating the sum total and synthesis of information. In addition, use of the profile could too easily result in giving an undeserved significance to certain facts and distort the appraisal of the sum total of facts.

Of course, the inability to use the "drug courier profile" to justify the arrest of appellant does not preclude arriving at the conclusion that there were facts known to the DEA agents amounting to probable cause; nor does the inability to use the "drug courier profile" in determining probable cause preclude consideration of facts listed as characteristics in the profile. The question is, as stated in *Smith* v *United States, supra*, 358 F.2d at 837, what collectively do the facts show?

What Agent Markonni knew for the purposes of probable cause was that appellant had taken a short trip,

lasting less than one day, to Los Angeles, a distant city from which federally controlled narcotics had been illegally coming into Detroit; that appellant had used an alias when paying for his ticket, which indicated the likelihood of an illicit purpose in the trip; that appellant had taken with him to Los Angeles one suitcase that was virtually empty; that appellant had a prior arrest for possession of heroin and had two non-drug related convictions; that appellant had left with American Airlines a telephone number to an apartment which was noticeably under surveillance for narcotics traffic; that appellant's personal residence was a place other than the apartment under surveillance for narcotics traffic, which supported the inference that the apartment under surveillance was a place used by appellant for narcotics traffic; and that appellant had returned to Detroit wearing the same clothes as when he had left.

While these facts could be interpreted in such a way as to provide an innocent explanation for appellant's behavior, Agent Markonni, as a prudent man, could reasonably conclude from all the facts put together that appellant had gone to Los Angeles to obtain narcotics. To permit an arrest under the attendant circumstances would establish no precedent to subject citizens to the caprice of police officers. We conclude that Agent Markonni had compiled enough information so that not to uphold his arrest of appellant would unduly hamper law enforcement.

A case similar to the present one was *United States* v *Prince, supra*, 548 F.2d 164. There the same DEA Agent Markonni discovered that the defendant Prince had taken a short trip to Los Angeles with a suitcase filled with money (although under his real name); that Prince had

left with American Airlines a telephone number of a Holiday Inn known for drug traffic; that Prince had stayed in the suspect motel the day prior to leaving for Los Angeles; that the place of employment which Prince had given to American Airlines was non-existent; that Prince had a police record which included one drug related felony conviction; and that there was expected to arrive in Detroit a quantity of heroin at the time that Prince happened to return to Detroit. This Court held that these facts collectively, considered under the approach stated in *Smith* v *United States, supra*, 358 F.2d at 837, constituted probable cause to arrest Prince and thus the heroin found in Prince's possession was a result of a lawful warrantless search incident to a valid arrest. *United States* v *Prince, supra*, 548 F.2d at 166.

United States v *Prince, supra*, 548 F.2d 164, cannot be distinguished from the present case on the ground that in *Prince* there was an informant's tip which permitted the arrest of Prince. This Court in *Prince* noted that the tip did not meet the requirements of *Draper* v *United States*, 358 U.S. 307 (1959), because the tip was not a reliable informant's tip and was in no way corroborated. The tip was simply one more piece of information that, put together with the other facts, permitted a determination of probable cause. Moreover, the absence of such an informant's tip in the present case does not make weaker our conclusion of probable cause. Certain other facts that Agent Markonni knew in the present case created a much stronger link between appellant and illegal narcotics traffic than those in *Prince*. Prince was connected to a motel with a reputation for drug traffic. Appellant was connected to a private apartment under the surveillance for drug traffic.

This decision is in harmony with the treatment of probable cause in *United States* v. *McCaleb, Page, Supra*, _____ F.2d _____. In *McCaleb*, this Court decided that the initial encounter between DEA agents and the defendants McCaleb and Page was an unconstitutional investigative stop not justified by *Terry* v. *Ohio, supra,* 392 U.S. 1, and the subsequent arrest was likewise unconstitutional. All that the DEA agents knew before making the stop was that McCaleb and Page had gone to Los Angeles on a short trip; that McCaleb and Page had one suitcase for themselves and a third person; and that McCaleb and Page were wearing the same clothes which they wore on their trip to Los Angeles. After the illegal stop, the DEA agents arrested McCaleb and Page once they learned that aliases were used on the flight coupons and that Page lied about the length of time they had been in Los Angeles. The DEA agents did not have probable cause to arrest McCaleb and Page, even using the information which was the fruit of an illegal *Terry* stop along with the information known before the stop, because, unlike in the present case and in *Prince*, the DEA agents arresting McCaleb and Page had no information outside what they had observed and learned at the airport to suggest that McCaleb and Page were presently or in the past connected with illegal narcotics traffic. Hence, what facts the DEA agents did have in *McCaleb*, although similar to those also present in appellant's case and in *Prince*, did not fit into a larger picture of narcotics traffic.

Affirmed.

APPENDIX "D"
ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed August 5, 1977)

United States of America, Plaintiff-Appellee v. William Van Lewis, Defendant-Appellant. No. 76-2125.

Before: Weick, Peck and Engel, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by defendant-appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore Ordered that the petition for rehearing be and it hereby is denied.

Entered by order of the Court

/s/ John P. Hehman
Clerk of Court

APPENDIX"E"

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

William Van Lewis, Petitioner, v. United States No. A-186

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 19, 1977.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 31st
day of August, 1977

Supreme Court, U. S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

No. 77-431

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM VAN LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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JEROME M. FEIT,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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WILLIAM VAN LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 556 F. 2d 385. The opinion of the district court is reported at 409 F. Supp. 535.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1977. A petition for rehearing was denied on August 5, 1977 (Pet. App. D). On August 31, 1977, Mr. Justice Stewart extended the time in which to file a petition for a writ of certiorari to and including September 19, 1977 (Pet. App. E), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest.

2. Whether the search of petitioner's suitcase, which he was carrying at the time of arrest, violated the Fourth Amendment.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment and a special parole term of three years. The court of appeals affirmed (Pet. App. C).

The facts relevant to petitioner's claims are set forth in the opinions of the court of appeals (Pet. App. 14-18) and the district court (409 F. Supp. at 539-540). They show that at approximately 10:50 a.m. on July 8, 1975, Susan Le Blanc, a ticket agent for American Airlines at Detroit Metropolitan Airport, informed Special Agent Paul Markonni of the Drug Enforcement Administration that a suspicious person using the name "J. Hall" had just purchased a first class ticket to Los Angeles, California, with currency of small denominations. According to Le Blanc, the man had checked a virtually empty suitcase and, although initially requesting a one way ticket, had bought a round trip ticket "because if everything went all right he would be coming back later that evening" (Pet. App. 14).[1]

[1]"J. Hall" seemed suspicious to Le Blanc because he appeared to match a "drug courier profile" developed by D.E.A. agents as a method of detecting narcotics traffickers. The characteristics listed on the profile include: (1) the use of small denomination currency for ticket purchases; (2) short trips to and from major drug import centers; (3) the absence of luggage or use of empty suitcases; (4) nervousness; and (5) use of an alias. See *United States* v. *McCaleb*, 552 F. 2d 717 (C.A. 6).

Agent Markonni immediately investigated Le Blanc's report and learned that the man's airplane reservation had been made earlier that week by telephone and that a telephone number had been provided as a contact. The number was listed to petitioner at an address in Detroit. Agent Markonni went to the residence and identified himself to the apartment manager, who spontaneously stated that the agent must have come to inquire about petitioner. When asked why he thought so, the manager told Agent Markonni that the Detroit Police Department was surveilling petitioner's apartment for alleged narcotics traffic. The manager's description of petitioner matched Le Blanc's description of "J. Hall."[2] Agent Markonni then contacted the police department, which informed him that petitioner had been arrested in February 1973 for possession of heroin and had been convicted of two non-narcotics related offenses.

At 4:00 a.m. on July 9, 1975, Agent Markonni was alerted by American Airlines that "J. Hall" was scheduled to return from Los Angeles early that morning. Accordingly, Agent Markonni and another D.E.A. agent went to the airport, where they observed petitioner (wearing the same clothing Le Blanc had described) leave the airplane and go to the baggage claim area. Because petitioner's suitcase did not appear on the luggage conveyor belt with that of the other passengers, he went to the baggage claim office. While waiting for his suitcase, petitioner noticed

[2]The manager also provided Agent Markonni with a description and license plate number of petitioner's car and expressed his belief that petitioner lived somewhere other than the apartment. A check disclosed that the license plate number was registered to petitioner at a second address in Detroit.

the agents and appeared nervous. As soon as he received the suitcase, petitioner proceeded through an airport terminal exit. At this point the agents approached petitioner and identified themselves, told him that they had reason to believe he was in possession of narcotics, and asked him to accompany them to an office inside the terminal. Once there, Agent Markonni asked petitioner whether his suitcase was locked. In response, petitioner bent over, reset the combination lock of the suitcase so that it could be opened, and stood up. Agent Markonni then opened the suitcase, which contained only a shaving kit and one piece of clothing. Inside the shaving kit the agents found a large quantity of heroin.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the agents lacked probable cause to arrest him when he claimed his suitcase at the airport. This claim was thoroughly considered and rejected by the courts below. As the court of appeals correctly held (Pet. App. 21-22):

> What Agent Markonni knew for the purposes of probable cause was that [petitioner] had taken a short trip, lasting less than one day, to Los Angeles, a distant city from which federally controlled narcotics had been illegally coming into Detroit; that [petitioner] had used an alias when paying for his ticket, which indicated the likelihood of an illicit purpose in the trip; that [petitioner] had taken with him to Los Angeles one suitcase that was virtually empty; that [petitioner] had a prior arrest for possession of heroin and had two non-drug related convictions; that [petitioner] had left with American Airlines a telephone number to an apartment which was noticeably under surveillance for narcotics traffic; that [petitioner's] personal residence was a

> place other than the apartment under surveillance for narcotics traffic, which supported the inference that the apartment under surveillance was a place used by [petitioner] for narcotics traffic; and that [petitioner] had returned to Detroit wearing the same clothes as when he had left.
>
> While these facts could be interpreted in such a way as to provide an innocent explanation for [petitioner's] behavior, Agent Markonni, as a prudent man, could reasonably conclude from all the facts put together that [petitioner] had gone to Los Angeles to obtain narcotics.

See *United States* v. *Prince*, 548 F. 2d 164, 165-166 (C.A. 6). Compare *United States* v. *McCaleb*, 552 F. 2d 717, 719-720 (C.A. 6).

2. Petitioner further contends (Pet. 8-10) that, even if the agents had probable cause to arrest him, the warrantless search of his suitcase was invalid under this Court's decision in *United States* v. *Chadwick*, No. 75-1721, decided June 21, 1977.[3]

a. In *Chadwick*, this Court held that federal law enforcement agents who had arrested several suspects, seized a footlocker from the trunk of their car, and

---

[3]Petitioner challenges the agents' failure to obtain a warrant for the first time before this Court, having argued below only that his arrest was invalid and that he had not consented to the search. The federal courts have repeatedly held that "where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." *United States* v. *Braunig*, 553 F. 2d 777, 780 (C.A. 2) (citations omitted). See also *United States* v. *Lovasco*, No. 75-1844, decided June 7, 1977, slip op. 5, n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

transported it to the agents' offices, were constitutionally required to obtain a warrant before searching its contents. The Court concluded that once the agents had seized the locker, gained "exclusive dominion" over it, and arrested its owner, there was no exigency requiring an immediate search and that a warrantless search was therefore unreasonable (slip op. 11-14).

Chadwick did not purport, however, to change the settled construction of the Fourth Amendment permitting warrantless searches incident to a custodial arrest of the arrestee and property in his immediate possession, including items (such as a suitcase) being carried. See *United States* v. *Edwards*, 415 U.S. 800, 802-803; *United States* v. *Robinson*, 414 U.S. 218, 236; *Abel* v. *United States*, 362 U.S. 217, 239; *Draper* v. *United States*, 358 U.S. 307, 314. Thus, the Court observed in *Chadwick* that "[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed" (slip op. 12) and it recognized that "[t]he potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved" (*id.* at 13). So here, the suitcase was "immediately associated with the person" of petitioner (*ibid.*), and the search was properly conducted as incident to and contemporaneous with petitioner's arrest. See *United States* v. *Gill*, 555 F. 2d 597, 599 (C.A. 6); *United States* v. *Prince*, *supra*, 548 F. 2d at 165; *United States* v. *Giles*, 536 F. 2d 136 (C.A. 6); *United States* v. *Cepulonis*, 530 F. 2d 238, 242 (C.A. 1), certiorari denied, 426 U.S. 922; *United States* v. *Eatherton*, 519 F. 2d 603, 610 (C.A. 1), certiorari denied, 423 U.S. 987; *United States* v. *Frick*, 490 F. 2d 666, 669-670 (C.A. 5),

certiorari denied, 419 U.S. 831; *United States* v. *Mehciz*, 437 F. 2d 145, 146-148 (C.A. 9), certiorari denied, 402 U.S. 974.[4]

b. The search of the suitcase also was justified by petitioner's consent.[5] Consent may be in the form of words, gesture, or conduct. *United States* v. *Griffin*, 530 F. 2d 739, 742 (C.A. 7); *Robbins* v. *MacKenzie*, 364 F. 2d 45, 48-49 (C.A. 1), certiorari denied, 385 U.S. 913. Here, when the agents asked petitioner whether his suitcase was locked, he responded by leaning over, resetting the combination lock so that the suitcase could be opened, and standing up. Petitioner also did not object when Agent Markonni opened the suitcase and searched its contents. These actions, as the district court correctly found (409 F. Supp. at 545), clearly constituted a consent to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 220;

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[4]Unlike in *Chadwick*, where the search took place an hour and a half after the arrest and in an entirely different location, here the search of petitioner's suitcase was neither "remote in time [n]or place from the arrest" (*United States* v. *Chadwick*, *supra*, slip op. 13, quoting from *Preston* v. *United States*, 376 U.S. 364, 367).

Even assuming that *Chadwick* could be interpreted to cast doubt upon the continued validity of warrantless searches of chattels taken from an arrestee at the time of his arrest, it should not be applied to searches occurring prior to the decision. See *United States* v. *Reda*, C.A. 2, No. 77-1062, decided October 12, 1977; *United States* v. *Montgomery*, 558 F. 2d 311 (C.A. 5), certiorari denied, No. 77-5205, October 31, 1977. As this Court observed in *United States* v. *Peltier*, 422 U.S. 531, 535, in the context of the exclusionary rule, which is unrelated to the truthfinding function of the criminal process, new constitutional principles have been accorded prospective application only.

[5]Although the district court found that petitioner had consented to the search, the court of appeals declined to reach the issue in light of its finding that the search was incident to a valid arrest (Pet. App. 17, n. 3).

United States v. *Bertucci*, 532 F. 2d 1144, 1146 (C.A. 7), certiorari denied, 429 U.S. 895; *United States* v. *Griffin*, *supra*, 530 F. 2d at 743-744; *United States* v. *Turbyfill*, 525 F. 2d 57, 59 (C.A. 8); *Robinson* v. *United States*, 325 F. 2d 880, 884 (C.A. 5).

Moreover, petitioner's consent satisfied the standards of voluntariness announced in *United States* v. *Watson*, 423 U.S. 411, 424-425, and *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227-234. The consent was given in the airport terminal and "not in the confines of the police station" (*United States* v. *Watson*, *supra*, 423 U.S. at 424); although petitioner was told he was suspected of carrying narcotics, he consented immediately, rather than after lengthy and "subtly coercive" questioning (*Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 229); and the record discloses no overt act, threat of force, or other form of coercion suggesting that petitioner's consent was compelled.

Nor is there any indication that petitioner was mentally deficient or unable to exercise a free choice. To the contrary, petitioner had the equivalent of a high school diploma (Tr. 87), was "of at least average * * * intelligence" (409 F. Supp. at 545), and was familiar to some extent with the criminal process by virtue of his previous arrests and convictions. Finally, as noted above, at no time prior to or during the search did petitioner voice any objections. Cf. *United States* v. *Bertucci*, *supra*, 532 F. 2d at 1146. Measured by "the totality of all the circumstances" (*Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227), petitioner's consent to the search of his suitcase was voluntary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

*The Solicitor General is disqualified in this case.

DOJ-1977-12